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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RON SIMMONS, Chairman,
Kentucky Parole Board, et. al.,

Petitioners,

vs.

GENE MORRIS DUNN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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Question Presented

After *Teague* v. *Lane*, 109 S.Ct. 1060 (1989), may a federal habeas court set aside a final decision of a state supreme court on the ground that the decision violates a rule which has been adopted by the federal court of appeals but which has *not* been adopted by the Supreme Court?

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Cases

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of

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1. CJLF has received written consent of the parties to file this brief.

society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF ARGUMENT

This case involves a disagreement between the Kentucky Supreme Court and the U.S. Court of Appeals for the Sixth Circuit on a question of law not yet addressed by this Court. The Kentucky court's decision was well within the mainstream of American jurisprudence and was more generous to the defense than many jurisdictions. In at least two other federal circuits, the state court decision would have been upheld on the key question of burden of proof. Yet because Kentucky happens to be in the Sixth Circuit, the judgment was set aside as being in violation of circuit precedent.

Under *Teague* v. *Lane*, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), new rules will not apply on federal habeas corpus unless they were announced by *this* Court prior to the day the conviction became final. Circuit precedent is irrelevant to this determination.

It therefore follows that the lower federal courts have no authority to set aside state court decisions which merely conflict with circuit precedent but which do not violate any precedent of the Supreme Court. Regardless of how old a circuit precedent may be, its rule is forever

"new" under *Teague* unless and until it is embraced by this Court.

This result makes sense, because it conforms to the long-standing rule that the lower federal courts have no authority to make precedents which are binding on the state courts. While federal habeas corpus allows this Court to delegate error correction to the lower federal courts, the making of precedents which are binding on the states rightly belongs only to this Court.

ARGUMENT

I. The state court decision was well within the mainstream.

The writ of habeas corpus was expanded early in this century to remedy such clear and unquestionable violations of constitutional rights as mob-dominated trials, *Moore* v. *Dempsey*, 261 U.S. 86 (1923), and total deprivation of counsel, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). It is a sad comment on how low the Great Writ has fallen that it was issued in this case merely because the Sixth Circuit disagrees with the Kentucky Supreme Court on a question where the state court is solidly in the mainstream of judicial thought while the federal court has drifted off into the bayou.

A. Federal Cases.

The Sixth Circuit insisted in this case that the "federal standard" requires a showing by "clear and convincing" evidence that the requirements of *Boykin* v. *Alabama*, 395 U.S. 238 (1969) were complied with in Dunn's prior convictions. Cert. Pet. 39a. This view appears to be entirely peculiar to the Sixth Circuit.

The Ninth Circuit has held that a silent record shifts the burden to the government to show a valid waiver. *United States* v. *Goodheim*, 651 F.2d 1294, 1299 (9th Cir. 1981). Neither *Goodheim* nor the cases it relies on identify the extent of that burden, but other Ninth Circuit cases dealing with analogous situations make clear that the burden is preponderance of the evidence. See *Farrow* v. *United States*, 580 F.2d 1339, 1355 (9th Cir. en banc 1978) (prior attacked on *Gideon* grounds); *United States* v. *Lord*, 711 F.2d 887, 891 n. 3 (9th Cir. 1983) (citing a variety of constitutional claims with preponderance burdens of proof).[2]

The Fifth Circuit has gone even further. In *Walker* v. *Maggio*, 738 F.2d 714, 717 (5th Cir. 1984), *cert. den.* 469 U.S. 1112 (1985), the Fifth Circuit stated "Petitioner has the burden to demonstrate facts establishing that his 1971 guilty plea was not intelligently and voluntarily made because he was not advised of his rights as required by Boykin." Accord, *United States* v. *Woods*, 870 F.2d 285, 287 (5th Cir. 1989).

The Fifth Circuit appears to be less generous to the defendant than the state court decision in the present case. It is certainly no more so. Kentucky appears to only require that the defendant produce some evidence. *Dunn* v. *Commonwealth*, 703 S.W.2d 874, 876 (Ky. 1985), *cert. den.* 479 U.S. 832 (1986). The Fifth Circuit requires the defendant to prove a prima facie case. *Woods*, *supra*, 870 F.2d at 287. Kentucky explicitly shifts the burden of

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2. The Ninth Circuit thus agrees with the Sixth Circuit on the burden of producing evidence and with the Kentucky Supreme Court on the ultimate burden of persuasion. Because Dunn did produce evidence, only the second question is actually presented by this case.

persuasion to the state. *Dunn*, *supra*, at 876. No such shift appears in the Fifth Circuit decisions. In leaving the burden of persuasion with the habeas petitioner, the Fifth Circuit is merely following the square holding of one of this Court's landmark cases: *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

Johnson had been convicted in a federal court for counterfeiting. *Id.* at 459. He had not been represented by counsel. Although he had not specifically requested counsel from the court, he claimed not to have waived counsel. *Id.* at 460-461.

Against the government's contention that Johnson had waived his right by failure to request counsel, Justice Black wrote his now-famous pronouncement for the Court:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 464 (footnotes omitted).

Taken alone, this passage might be taken to imply that the "presumption against waiver" shifts the burden of proof to the government to prove nonwaiver. Justice Black dispelled this misconception in no uncertain terms.

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel.
>
> * * *
>
> "If petitioner fails to sustain this burden, he is not entitled to the writ." *Id.* at 468-469 (footnotes omitted).

In subsequent habeas corpus cases, this Court repeatedly reaffirmed the rule of *Johnson* v. *Zerbst*: the burden is on the petitioner to prove his factual allegations by the preponderance of the evidence. *Walker* v. *Johnston*, 312 U.S. 275, 286 (1941); *Hawk* v. *Olson*, 326 U.S. 271, 279 (1945); *Darr* v. *Burford*, 339 U.S. 200, 218 (1950) overruled on other grounds *Fay* v. *Noia*, 372 U.S. 391, 435 (1963); *Brown* v. *Allen*, 344 U.S. 443, 458, n. 6 (1953).

In *Moore* v. *Michigan*, 355 U.S. 155 (1957), the petitioner claimed, on state collateral review, that although he had waived counsel his waiver was not knowing and intelligent. The Court followed *Johnson* v. *Zerbst*, *supra*, holding that "the petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." *Id.* at 161-162.

In *Carnley* v. *Cochran*, 369 U.S. 506 (1962), the petitioner affirmatively alleged that he had requested counsel, and the return did not allege an affirmative waiver of counsel. *Id.* at 516 n. 10. Nevertheless, the state su-

preme court presumed a waiver from the mere fact of defendant's appearance at trial without counsel, and denied habeas corpus without a hearing. *Id.* at 513. The Supreme Court held this presumption impermissible.

> "Nor is it an answer to say that he may counter such presumptions on collateral attack by showing — if he can — that he had not in fact agreed, or been willing, to be tried without counsel. To cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we laid down in *Johnson* v. *Zerbst*, 304 US 458, 464-465 . . . ." *Id.* at 514.

This language might, on its face, seem to support the notion that the burden of proving waiver is on the government, but a closer examination reveals that *Carnley* makes no such holding. First, the opinion itself declares absolute fidelity to *Johnson* v. *Zerbst*, which unequivocally places the burden on the petitioner.[3] More importantly, the Court treated this case as one of undisputed facts. Between the petitioner's allegation that he requested counsel and the absence of any allegation of waiver in the return, nonwaiver was established by the pleadings. *Id.* at 516 n. 10. Under these circumstances, there is no burden of proof issue.

Recent cases contain little discussion of the burden of proof on collateral attack. The last square holding appears to be *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971), placing the burden of proving indigency for a *Gideon* claim[4] on the habeas petitioner. The only recent word we have found is an approving citation of *Moore* v. *Mich-*

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3. See p. __, *supra*.

4. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

igan, *supra*, in *Colorado* v. *Connelly*, 479 U.S. 157, 169 (1986) (reaffirming the preponderance of the evidence standard in *Miranda* cases).

The requirements imposed by the Sixth Circuit, that the government bears the burden of proving compliance with *Boykin* and that the burden is proof by clear and convincing evidence, are not found in any opinion of this Court or in any consensus among the federal circuits. To the extent these sources indicate a correct answer, they indicate that the Kentucky court was, if anything, overly generous to the defendant.

B. State Cases.

As petitioner has noted, *People* v. *Harris*, 61 N.Y.2d 9, 459 N.E.2d 170 (1983) is contrary to the decision of the court below. Actually, the New York rule is even *less* favorable to the defendant than the rule adopted by the state court in the present case. *Harris* held that once the fact of the prior conviction is proven, defendant bears the burden of *proving* its unconstitutionality. *Id.* at 15, 459 N.E.2d at 172. Texas also places the burden of proof on the defendant, at least with respect to right-to-counsel claims.[5] *Disheroon* v. *State*, 687 S.W.2d 332, 334 (Tex. Cr. App. 1985).

The Utah Supreme Court recently provided a helpful survey of state decisions in a right-to-counsel case, *State* v. *Triptow*, 770 P.2d 146 (Utah 1989). *Triptow* identified three divergent views: (1) placing the burden of proof of

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5. There is no reason for a *Boykin* claimant to have a *lower* burden of proof than a *Gideon* claimant. See *People* v. *Sumstine*, 36 Cal.3d 909, 922, 687 P.2d 904, 913 (1984). The right to counsel is by far the more imporant right.

unconstitutionality on the defendant by a preponderance of the evidence; (2) requiring the prosecution to prove representation or waiver by at least a preponderance as part of its case in chief; and (3) placing the burden of production of evidence on the defendant but shifting the burden of persuasion to the state upon the defendant's production of any evidence. *Id.* at 148. The third category represents the "middle ground." The Utah court identifies Florida, New Jersey and Rhode Island as being in the first group,[6] Hawaii, Kansas and Ohio as being in the second, and Indiana, Maryland and North Carolina as the third. *Ibid.* The *Triptow* court joins the third group, *id.* at 149, which also includes Kentucky by virtue of the present case.

Kentucky is thus squarely in the middle of the states which have considered the issue.

II. After *Teague* v. *Lane*, circuit precedent cannot establish a rule applicable on habeas corpus.

In *Teague* v. *Lane*, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), this Court established that, with rare exceptions not applicable here, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 1075, L.Ed.2d at 356.[7]

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6. As discussed above, we would also include New York and Texas.

7. This portion of *Teague* is a plurality opinion, but it was endorsed by a majority in *Penry* v. *Lynaugh*, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256, 274 (1989).

Announced by whom? The Court's treatment of Teague's claim leaves no doubt, if indeed there had been any, that a rule is "new" when it is announced by the Supreme Court, no matter how long ago lower courts may have accepted the argument.

Teague's contention was "that the Sixth Amendment's fair cross section requirement applies to the petit jury." *Id.* at 1069, L.Ed.2d at 348. This was hardly a novel argument. It had been accepted by the California Supreme Court over a decade earlier, albeit under a cognate provision of the state constitution. *People* v. *Wheeler*, 22 Cal.3d 258, 276-277, 583 P.2d 748 (1978). Two federal circuits had upheld claims similar to Teague's. *Booker* v. *Jabe*, 775 F.2d 762, 767-71 (6th Cir. 1985), *vacated sub. nom. Michigan* v. *Booker*, 478 U.S. 1001 (1986), *opinion reinstated*, 801 F.2d 871 (1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray* v. *Abrams*, 750 F.2d 1113, 1130-31 (2d Cir. 1984), *vacated sub. nom. Abrams* v. *McCray*, 478 U.S. 1001 (1986); *Roman* v. *Abrams*, 822 F.2d 214, 225 (2d Cir. 1987) (reaffirming *McCray*).

These lower court authorities had been briefed to the *Teague* Court, see Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 13, but they made no difference to the Court's analysis. Announcing that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final," 109 S.Ct. at 1070, 103 L.Ed.2d at 349 (italics in original), the Court looked only at its *own* precedents in making that determination. *Ibid.*

Where does this leave rules announced by lower federal courts but not embraced by this Court? The clear import of *Teague* is that such rules cease to apply on habeas corpus. The lower federal courts no longer have authority to make new rules on habeas corpus, absent

one of the rare exceptions. See *id.* at 1078, L.Ed.2d at 360. Without such authority, there is no justification for imposing circuit precedent on the states.

The lower federal courts have never had the authority to make precedent which is directly binding on the state courts. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.402[1] at 23 (2nd ed. 1988). Why, then should they be authorized to set aside a state court judgment merely for failure to follow a precedent which the state court has *no obligation* to follow?[8] If the state court duly followed all precedents binding upon it, is petitioner genuinely "in custody in violation of the Constitution . . . of the United States"? See 28 U.S.C. § 2254(a). If not, the federal courts have no jurisdiction to issue the writ. *Ibid.*

The Harlan theory adopted by this Court in *Teague* is as much a rethinking of the purpose of habeas corpus as it is a theory of retroactivity. See *Mackey* v. *United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring and dissenting). Its implications are only beginning to be understood.

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8. The Kentucky Supreme Court's decision, says the Sixth Circuit, "offends this court's requirement in *Roddy* . . . ." Cert. Pet. 35a. The refusal of a coordinate court to follow a decision not binding upon it may be offensive to the Sixth Circuit, but it was well within the Kentucky Supreme Court's authority.

Conclusion

This Court should grant certiorari to resolve this important issue.

Dated: November, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation